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RIGHTS OF CONSULAR OFFICERS TO LETTERS OF ADMINISTRATION UNDER TREATIES WITH FOREIGN NATIONS.

The Supreme Court of the United States during the past year has rendered a decision of considerable interest from the standpoint of international relations. Since Marshall's time, the Court has done much to develop International Law and some of its decisions have been really epoch-making in that they have made into law that which had before been little more than matter of international usage or custom. A fair criterion as to whether a point of law has been well decided is: does it make for closer, better and more peaceful relations betwen the nations of the world? It may well be that certain questions are so foreclosed by precedent that little latitude is left to the Court, but, on the other hand, most of these international questions may, without revolutionizing precedent, be decided either from a broad standpoint of world polity or from the attitude of a mere nationalism. An instance of the former class is found in the case of *The Paquete Habana*,[1] in which by a divided Court fishing vessels were held exempt from capture by a blockading squadron in accordance with the more modern views of modern text writers and publicists. The decision that we will here discuss[2] seems to have been reached rather from the particularistic standpoint, and evinces a desire on the part of the Court, not to extend consular jurisdiction by adopting a liberal attitude in construing treaties conferring privileges upon these officers.

The facts which gave rise to this case were as follows: Ghio,

[1](1900) 175 U. S. 677.

[2]Rocca *v.* Thompson (1912) 223 U. S. 317.

a subject of the Kingdom of Italy, died in California leaving a personal estate. He, himself, resided in California but left heirs at law in Italy. Upon his death the Consul General of Italy made application to the Superior Court of California for Letters of Administration upon his estate. The defendant in error, Thompson, as Public Administrator, also made application for administration upon the same estate relying upon the laws of California. The Superior Court held the Public Administrator entitled to administer the estate and the application of the Consul unfounded. This decision was affirmed in the Supreme Court of California[3] and the case was appealed to the Supreme Court of the United States. The question, while a new one in that Court, had been passed upon in several other jurisdictions.

The Supreme Court of Massachusetts, in the case of *Matter of Wyman,*[4] had decided that under the Treaty clauses hereinafter cited, the Consul was to be preferred as administrator to the Public Administrator and that the Treaty overrode the local Statute. This view had been taken by the Supreme Court of Alabama,[5] and also by the Appellate Division of the Fourth Department in New York,[6] as well as by some of the Surrogate's Courts.[7] The only authority to the contrary was the California decision at bar.

In the California case, as well as in the Massachusetts and Alabama cases, the main Treaty provisions relied upon were:

First, articles 16 and 17 of the Treaty between Italy and the United States:

"Article XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consuls or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

"Article XVII. The respective consuls general, consuls, vice-consuls and consular agents, as likewise the consular chancellors, secretaries, clerks or attachés, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may

[3]Estate of Ghio (1910) 157 Cal. 552.

[4](1906) 191 Mass. 276.

[5]Carpigiani *v.* Hall (1911) 172 Ala. 287.

[6]*In re* Scutilla's Estate (1911) 129 N. Y. Supp. 20.

[7]*In re* Fattosini (N. Y. 1900) 33 Misc. 18; *In re* Tartaglio (N. Y. 1895) 12 Misc. 245; *In re* Lobrosciano (N. Y. 1902) 38 Misc. 415; and see *In re* Logiorato (N. Y. 1901) 34 Misc. 31.

hereafter be granted to the officers of the same grade, of the most favoured nation." [8]

Article 9 of the Treaty between the Argentine Republic and the United States of July 27, 1853, which reads as follows:

"* * * If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." [9]

It was argued in behalf of the Consul that the Most-Favored-Nation treatment required that the Italian Consul should be given the right accorded to Argentine Consuls in the United States and that these rights were equivalent to administration of the estate.

These were not, however, the only Treaty clauses relied upon, although the Supreme Court directs the discussion wholly to an interpretation of the provision of the Argentine law. In addition, however, to this provision counsel cited the provisions of a number of other Treaties. These are as follows:

Article 15 of the Treaty of 1880 with Belgium provides that:

"In case of the death of any citizen of the United States in Belgium, or of any citizen of Belgium in the United States, without having any known heirs or testamentary executor by him appointed, the competent local authorities shall give information of the circumstance to the consuls or consular agents of the nation to which the deceased belongs, in order that the necessary information may be immediately forwarded to parties interested.

"Consuls-general, consuls, vice-consuls and consular agents shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs, or creditors, until they are duly represented." [10]

The Treaty of 1851 with Costa Rica, Article 8, provides:

"If any citizen of either of the two high contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to nominate curators to take charge of the property of the deceased, so far as the laws of the country will permit, for the benefit of the lawful heirs and creditors of the

[8] 20 U. S. Stat. at Large, 725, 732.
[9] 10 U. S. Stat. at Large, 1005, 1009.
[10] 21 U. S. Stat. at Large, 776, 783.

deceased, giving proper notice of such nomination to the authorities of the country." [11]

A similar provision is found in Article 8 of the Treaty of 1864 with Honduras.[12]

The Tenth Article of the Treaty of 1859 with Paraguay provides:

"In the event of any citizen of either of the two contracting parties dying without will or testament in the territory of the other contracting party, the consul-general, consul, or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, or vice-consul shall, so far as the laws of each country will permit, take charge of the property which the deceased may have left, for the benefit of his lawful heirs and creditors, *until an executor or administrator be named by the said consul-general, consul, or vice-consul or his representative.*" [13]

The Treaty of 1856 with Persia, Article 6, provides:

"In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; and in case he has no relations or partners, his effects in either country shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country." [14]

The Treaty of 1887 with Peru, which was terminated by notification from Peru, October 8th, 1898, contained the following provision:

"Art. 33. Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated, that in the absence of the legal heirs or representatives the consuls, or vice-consuls of either party shall be ex-officio the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea whose property may be brought within their district." [15]

The international sanctity of such a Treaty Clause is instanced by the decision of the Mixed Commission in the arbitration betwen Peru and the United States of 1857. This Commission in the *Matter of Vergil* awarded damages to the heirs of the deceased

[11] 10 U. S. Stat. at Large, 916, 921.
[12] 13 U. S. Stat. at Large, 699, 703.
[13] 12 U. S. Stat. at Large, 1091, 1096.
[14] 11 U. S. Stat. at Large, 709, 710.
[15] 25 U. S. Stat. at Large, 1444, 1461.

Peruvian citizen Vergil because the Peruvian Consul was not allowed to act as executor or administrator in accordance with the Treaty of July 26th, 1851.[16]

Counsel for the Public Administrator relied upon three propositions:

First, that the Treaty could not constitutionally supersede the local law and that the Consul could not thus displace the Public Administrator whose rights were fixed by state statute; Second, that a fair interpretation of the Treaty clause in question did not entitle the Consul to administration; and Third, that the Most-Favored-Nation Clause did not apply to such a situation.

The Supreme Court did not pass upon the first or second points. As to the first point the opinion states:

"* * * There is, of course, no Federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the National Government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the States, and to commit such administration to the consular officers of the Nations to which the deceased owed allegiance, we will proceed to examine the treaties in question with a view to determining whether such a right has been given in the present instance." [17]

We cannot, however, feel that the Court had any real doubt as to the constitutionality of a Treaty granting to Consuls the right to administer upon the estates of their deceased nationals for the benefit of foreign heirs. The Constitution makes the Treaty the Supreme Law of the land, and no Treaty has as yet been declared unconstitutional. That by a broad stretch of legal imagination it may be conceived that a Treaty should attempt to regulate matters so peculiarly within the domain of State autonomy as to strike at the root of our constitutional balance is possible. The short answer here, however, is that one of the most usual, natural, necessary and proper subjects to be regulated by Treaty are the rights, privileges and immunities of diplomatic officers and consuls. This is equally true as to the protection of the persons and property of alien citizens or subjects. A reference to the development of International Law as regards the powers and functions of consuls, to the legislation and regulations of the United States and to the Treaties in force makes this altogether clear. These matters will be referred to hereinafter.

As to the general question, we will do no more than enumerate

[16] 4 Moore Int. Arb. 4390.

[17] 223 U. S. 317, 329.

a few of the leading cases in this Court on the subject. An obviously pertinent statement of the settled doctrine is found in the *Head Money Cases:*

"* * * A treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." [18]

This statement of the law, as far as we know, has never been dissented from. Should a state law and a Treaty be in conflict, the state law must give way.[19]

It is also established by the decisions of this Court that such Treaties must be construed in most liberal fashion, and that Treaty rights are always paramount to state legislation.[20]

In the case of *Wyman, Petitioner,* in the Supreme Court of Massachusetts [21] the Attorney-General made a similar argument to that here presented by Counsel for the Public Administrator, relying upon the decision of the Supreme Court of Louisiana in the matter of the succession of Charles Thompson.[22] This decision is very short and is as follows:

"Ogden, J. The succession of the deceased was duly opened in the Second District Court as that of a foreigner not domiciled in this State, and leaving property within the jurisdiction of the Court. The petitioner, as Vice-Consul of the King of Sweden and

[18](1884) 112 U. S. 580, 598, 599, *per* Miller, *J.*

[19]U. S. *v.* Forty-three Gallons Whiskey (1876) 93 U. S. 189, 197, 198; and to the same effect, Ware *v.* Hylton (1796) 3 Dall. 199, 235.

[20]Shanks *v.* Dupont (1830) 3 Pet. 241, 249; Geofroy *v.* Riggs (1889) 133 U. S. 258, 267; Hauenstein *v.* Lynham (1879) 100 U. S. 483, 488-90.

[21](1906) 191 Mass. 276.

[22]Lanfear *v.* Ritchie (1854) 9 La. An. 96.

Norway, for the port and city of New Orleans, represents that the deceased was a Swede by birth, and at the time of his death was a subject of the King of Sweden. On this ground he claims the right, in his capacity of Consul, to take the succession out of the hands of the defendant, who is the duly appointed administrator. This right he alleges he is entitled to exercise under the law of nations, the laws of the United States, and by virtue of treaties entered into between the United States and the King of Sweden and Norway.

The right claimed is incompatible with the sovereignty of the State, whose jurisdiction extends over the property of foreigners as well as citizens found within its limits. The disposition of the estates of foreigners has been made the subject of special legislation, and no treaty or law of the United States exists which as the paramount law confers any such right as is claimed by the petitioner; nor are we aware of any principle of the law of nations which would entitle the petitioner to call in question the authority of our laws on that subject."

The Supreme Court of Massachusetts said of this case:

"* * * In *Lanfear* v. *Ritchie,* 9 La. Ann., 96, decided in 1854, the decision was against the vice-consul of Sweden and Norway, on the ground that the right claimed was 'incompatible with the sovereignty of the State.' But this was at a time when we might expect the doctrine of State rights to be strongly insisted upon."[23]

The present case was in litigation at or about the time when the Japanese school question was of paramount interest in the State of California, as well as in the Nation. While it is not intended to intimate that this may have influenced the decision of the California courts in this case, which is not put on the ground of the unconstitutionality of the treaty clauses referred to, yet possibly the atmosphere of the State of California may have insensibly caused its learned courts to gravitate toward a view of State rights which seems inconsistent with the later developments of our constitutional law and even irreconcilable with prior decisions of the Supreme Court of the State of California itself as the following decisions indicate.

In *People* v. *Gerke* [24] there was considered a treaty with Prussia of 1828 which provided that where, upon the death of a person holding real estate, it would descend upon a citizen or subject of the other power "were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same and

[23] (1906) 191 Mass. 276, 278.

[24] (1855) 5 Cal. 381, 384.

to withdraw the proceeds without molestation." The objection was made by the Attorney-General of California that the enforcement of such a provision "permits the Federal Government to control the internal policy of the States, and in the present case to alter materially the statutes of distribution." The Court says:

"If this was so to the full extent claimed, it might be a sufficient answer to say, that it is one of the results of the compact, and, if the grant be considered too improvident for the safety of the States, the evil can be remedied by the constitution making power."

In *Forbes* v. *Scannell* [25] was considered a provision of the laws of California (the act for the relief of insolvent debtors) that "No assignment of any insolvent debtor, otherwise than as provided by this Act, shall be legal or binding upon creditors." Nye Brothers & Co., an American firm doing business at Canton, China, failed. Gideon Nye, the resident partner, executed an assignment for the benefit of creditors before the United States Consul. Property of the firm in San Francisco was seized by their creditors. The assignee sued the Sheriff for damages, claiming precedence for the assignment over the Court process under which the creditors seized the property, as being supported by the Treaty with China of July 3, 1844, and the Act of Congress of August 11, 1848, to carry into effect the provisions of the Treaty. There was no question that the assignment was not executed in accordance with the California statute, but the Treaty and the statute of 1848, regulating the rights of American citizens in China validated such assignment if made either in accordance with (1) the Laws of the United States, (2) the Common Law or (3) Decrees and Regulations to be made by the United States Commissioner to China.

This displacement of the insolvent laws of California by the Treaty was explicitly upheld, and judgment rendered for plaintiff assignee.[26]

As yet no Treaty has been declared unconstitutional, but it is now settled law that a Treaty clause has no more force or effect than a statute and that as between inconsistent Treaties and statutes, the latter will prevail.[27]

It is impossible, however, to fix any constitutional limits to the Treaty making power. The whole question was much discussed during the Insular cases but it was not necessary for the Court to

[25] (1859) 13 Cal. 243, 276-282.

[26] Following, citing and approving People *v.* Gerke, Baldwin & Field, *J.J.*

[27] Chinese Exclusion Cases (1888) 130 U. S. 581.

pass upon it in any of those litigations. It is safe to say that all matters of general concern to the Nation, in its dealings with foreign Nations, are proper matter for the Treaty making power, and it is perhaps unfortunate that the Court did not so categorically state in this case.

The discussion of the meaning of the language employed in the Argentine Treaty turned not only upon the scope to be given to the precise language, but also upon the usages and practices in regard to Consuls. If the California interpretation, sanctioned by the Supreme Court be correct, then the Argentine Treaty clause did nothing more than to declare already existing International Law. This judicial interpretation, therefore, completely nullifies the Treaty clause and leaves it wholly without value.

The Court discusses the literal meaning of the word "intervene" in various systems of law and concludes:

"* * * This term can only have reference to the universally recognized right of a consul to temporarily possess the estate of a citizen of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administrtion and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene.

"So, looking at the terms of the treaty, we cannot perceive an intention to give the original administration of an estate to the Consul-General, to the exclusion of one authorized by local law to administer the estate." [28]

From an examination of existing statutes and usage it appears that consuls already possessed this right, the Court by a strict construction thus leaving the matter exactly as though this portion of the Treaty had never come into existence.

It is the general practice under the law of nations for consuls, upon the death of one of their nationals, to take part in caring for the property left by him, especially in case of intestacy, and seeing that it reaches its destination. This is one of the usual and normal functions of the consuls of all civilized nations and as such is generally recognized by usage, by statute and by formal executive regulations in the United States and in European countries.

The laws of the United States on this subject are therefore nothing more than a codification of international usage. As show-

[28] (1912) 223 U. S. 317, 331.

ing how widespread and established this usage has become we cite the following from a standard French work on the subject, Guide Pratique des Consulats, by de Clercq and de Vallat, a work of generally recognized value. It is said: [29]

"Sec. 533. Intestate succession. Finally, if the deceased has left no will, or if there are no heirs present, the succession must then be considered as vacant and the consular authority intervenes to assure its conservation for the protection of those who may have rights therein.

"The first formality to fulfil in this case consists in placing the seals upon the domicil of the deceased. Some governments in order to assure the payment to possible creditors have this proceding performed at once by their officers of justice; others, and this the greater number, recognize the right of consuls to put their seals on, together with those of the territorial authority; some others consent to the Consul alone placing his seals (on the property) upon condition that should local creditors present themselves their rights will be unaffected.

"At the expiration of the time fixed by law the seals are taken off and the property examined and inventoried. The inventory is made either by the consul or by the local authority in the presence of the consul. * * *

"The inventoried articles are preserved in storage either at the consulate or in the house of the deceased under the care of the consul to whom generally, in accordance with Treaties, the territorial authority abandons the right of liquidation of successions. In some countries, however, it is this authority which administers and liquidates the successions itself and then turns over the proceeds to the legitimate heirs or hands them to the consuls."

The general powers of United States consuls were admirably set forth by Secretary Marcy in 1855. He says:

"The consuls of the United States are authorized and required to act as administrators on the estates of all citizens of the United States dying intestate in foreign countries and leaving no legal representative or partner in trade. Indeed this is one of the most sacred and responsible trusts imposed by their office, and in this respect they directly represent their government in protecting the rights and interests of the representative of deceased citizens."[30]

As far back as 1799, Mr. Pickering, then Secretary of State, citing a clause of the Jay treaty,

"to the effect that consuls 'should enjoy those liberties and rights which belong to them by reason of their function,' said: 'Now, I conceive one of the consular rights and a duty to be to receive, inventory, take care of and account for the effects of any subject of

[29] Vol. 1, 522.

[30] 5 Moore Dig. Int. Law 118.

the nation by which the consul is appointed, and who dies within his jurisdiction or consulate.' He added that the subject was often explicitly regulated by treaties, but that he understood it to be 'a general usage to which civilized nations have tacitly or practically assented.' " [31]

The recognition of this general usage is embodied in our Revised Statutes as follows:

"Sec. 1709. [*Estates of Decedents.*] It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

Fifth. To transmit the balance of the estate to the Treasurer of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."[32]

The Consular Regulations of the United States set forth in detail the duties of consuls in this matter and contain the same general principles as those that we have quoted from the Guide Pratique des Consulats.

"Sec. 409. A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting, and transmitting them, to be dis-

[31] *Ibid.* 117.

[32] 2 Fed. Stat. 797.

posed of pursuant to the law of the decedent's State—*7 Op. Att. Gen., 274.* It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory.

"Consul's Powers Under the Treaties.

"Sec. 411. *Argentine Republic and Colombia.*—Consular officers in the Argentine Republic may, when any citizen of the United States dies within their respective jurisdictions, intervene in the possession, administration, and judicial liquidation of his estate, conformably with the laws of the country. The proceedings in such case must be in the ordinary courts of the country, unless waived by the local authorities. In Colombia a consular officer has the right to take possession of the effects of a deceased citizen, and to make inventories and appoint appraisers. In his proceedings he is required to act in conjunction with two merchants, chosen by himself, and in accordance with the laws of the United States and with the instructions he may receive from his own Government." [33]

Section 78 of the Consular Regulations refers to the Most-Favored-Nation Clause as follows:

"78. Some of the consular treaties of the United States contain a clause commonly called 'the Most-Favored-Nation-Clause.' *This right is secured by treaties with the Argentine Republic,* Austria-Hungary, Belgium, Bolivia, Colombia, Costa Rica, the Dominican Republic, Denmark, Ecuador, Egypt, France, Germany, Hawaiian Islands, Haiti, Honduras, Italy, Kongo Free State, Korea, Japan, Madagascar, Morocco, Netherlands (and colonies), Nicaragua, Orange Free State, Paraguay, Persia, Peru, Portugal, Prussia, Roumania, Russia, Salvador, Servia, Spain, Switzerland and Tripoli. In those countries consuls of the United States are entitled to claim as full rights and privileges as have been granted to consuls of other nations." [34]

Treaties of the United States with foreign countries generally contain provisions regarding the authority of Consuls and their duties in connection with decedents' estates. These provisions usually state somewhat more precisely and in detail the power of consuls as developed by the consensus of nations. They differ, however, in this respect from mere International Law and usage, in that where the functions of a consul are fixed by treaty, his authority must necessarily override local statutes, whereas in the absence of such treaty his foreign functions are largely auxiliary to the local law which may, unless it recognizes very fully international comity, reduce the consuls' functions as regards decedents' estates within somewhat narrow limits.

[33] United States Consular Regulations 161-2.

[34] *Ibid.* 30.

It is not unreasonable to presume that the learned gentlemen who negotiated this Treaty had in mind this general usage, the United States statutes and other treaties to the same effect. It is hardly fair to their intelligence to assume that they were merely trying their hands at declaring International Law which was already embodied in the usages of nations.

In addition, however, to this consideration the Court did not advert to the fact (disclosed in the briefs) that this precise question had come before the Italian Court of Cassation on the application of the American Consul acting under the instructions of the Department of State, and that the right denied the consul by the ruling of the Supreme Court had been conferred upon him by the decision of the Court of Cassation. In reversing the lower courts in refusing to recognize the rights of the American Consul under the Most-Favored-Nation Clause the Court of Cassation held:[35]

"In regard to the third finding, it is observed that the fundamental error of the judgment lies in having denied that the consul-general had, by virtue of the law and the treaties, the power to bring before an Italian magistrate, and without special power from the heirs, an action for the recovery of an undue payment interesting the estate, said action being directed to re-establish the integrity of the estate as it was left.

"The judgment miscomprehended the consular convention established between the United States of America and Italy in 1878, securing for the contracting parties the treatment of the most-favored nation and empowering by right the consuls to represent judicially in certain cases the estates of their respective citizens, whether one considers France by her convention of July 26, 1862, or Russia by her convention of April, 1875, to be the most-favored nation. It is a fact that by virtue of article 9 the powers of the consuls are established as follows: (a) To place and remove seals; (b) to prepare inventories; (c) to sell perishable goods; (d) to care for and deposit funds and incomes of the estate; (e) to ascertain, to collect, and to settle claims; (f) to administer and to represent also judicially the estate; and to this effect the convention adds:

" 'In all questions arising from the publication, administration and liquidation of estates of citizens of one of the two countries in the other the respective consul-generals, consuls and vice-consuls will represent by full right the heirs and shall be recognized officially as their attorneys without being obliged to justify their mandate by a special power.'

"They may consequently appear in person or by attorneys, chosen among such as are so authorized by the legislation of the

[35]Suit between Mr. De Castro, U. S. Consul General, and Mrs. Rebecca Dawes Rose. Judgment rendered by Court of Cassation, Feb. 4, 1907. For. Rel. of U. S., 1907, part II. 750.

country, before the competent authorities, to take charge in every case concerning the estate, of the interest of the heirs, by prosecuting their rights or answering the claims against them.

"From these words the understanding clearly arises that when the succession of a foreigner is opened in Italy it is the consular representative of the foreign nation itself who undertakes for him to do everything, and not only to administer his property but to liquidate it in order to be able to hand it over to the heirs within a period of time of not less than six months. This is the scope of power which the national law assumes toward its own citizens, and this is the scope of power delegated by the nation in its turn to its consular agents.

"For this reason it is obvious that the consul during the period of liquidation may also bring an action for the recovery of unlawful payments. From the moment that he is the administrator and the legal representative of the estate in Italy, in the absence of heirs and in cases contemplated by the conventions, it follows that judicially in him resides the *universum ius* and that during that period he may, or should, bring any action in Italy interesting the heirs.

"Whereas by these arguments it appears useless to examine the last motive the judgment must be annulled, and so it is decided."

The Court of Cassation would thus appear to have taken the broad view of consular treaty rights. How far the Italian authorities will feel bound in honor to maintain this view after the decision in the *Ghio Case,* we do not know, but certainly we can scarcely continue to demand as of right for our consuls privileges which we refuse to grant to those of Italy.

We are at some loss to understand why the Supreme Court should have apparently ignored this careful decision of the Court of Cassation which, while it could have no authoritative force, certainly illumines the question by indicating the view taken of its solution by one of the high contracting parties.

Nor does the Court advert to the other treaty clauses referred to with the exception of the Peruvian and Swedish treaties. As to these the Court says:

"It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru in 1887." (Above referred to.)

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"And in the convention between the United States and Sweden, proclaimed March 20, 1911, it is provided: 'In the event of any citizens of either of the two Contracting Parties dying without will or testament, in the territory of the other Contracting Party, the consul-general, consul, vice-consul-general, or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice-consul-general, or vice-consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate.'[36]

It is to be observed that this Treaty while ratified subsequent to the application for administration on the part of the Italian Consul was in force for some months before this case was argued and was called to their attention by counsel both in brief and argument. It would have been quite possible for the Court to have held that the Treaty was applicable to the case at bar as the Public Administrator could scarcely be held to have acquired vested rights in the estate, or at least his rights should not have extended beyond the payment of commissions on the administrative acts already performed.

The Court, however, does not advert to this consideration and as the Government apparently deemed it useless to make further efforts to sustain their supposed rights under the Treaty, the question was not further pressed in this case.

Counsel for the Italian Government referred to a statement of the law of the Argentine Confederation,[37] to the effect that upon a foreigner dying intestate in the Argentine Republic, leaving foreign heirs, the consul of the deceased foreigner's nation is given the right to intervene.

In disposing of this contention Mr. Justice Day says:

"It is contended that the right secured to a foreign consul to appoint an executor under this act of 1865 is evidence of the fact that the Argentine Republic is carrying out the treaty in the sense contended for by the plaintiff in error; but in this law certainly no right of administration is given to the consul of a foreign country. *It is true, he may appoint an executor,* which appointment it is provided is to be at once communicated to the testamentary judge.

"In Art. VIII the same law provides that executors shall perform their charge in accordance with the laws of the country. Art.

[36](1912) 223 U. S. 317, 332.

[37]Found in 58 British and Foreign State Papers, 455.

XIII declares that the rights granted by the law shall be only in favor of the nations which cede equal privileges to Argentine consuls and citizens." [38]

Is the right to appoint an executor not practically equivalent to allowing the consul to act himself? Certainly it is an extension of the general international usage in the absence of treaty. In any event the language of this law would indicate that the Argentine Republic construed the Treaty more liberally than does our Supreme Court and we find it difficult to note the distinction between the appointment of an executor and the appointment of the consul himself.

In a matter of such international importance and between nations whose system of laws differ, so narrow a distinction appears somewhat over-legalistic.

The opinion of the Supreme Court concludes as follows:

"Our conclusion then is that, if it should be conceded for this purpose that the most favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian Government in the respect contended for, (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property at the time of decease." [39]

The question of the Most-Favored-Nation clause is thus not passed upon. This question in itself is of great interest and importance and must ultimately be determined by the courts.

The able counsel who appeared for the State of California argued that

"The 'most-favored-nation' clause in a treaty goes no further than to secure to the nation for whose benefit it is written the advantages or privileges which may be granted *freely and without consideration* by its ally to other nations. But the 'most-favored-nation' clause does not automatically convey to a treaty-party benefits which may be conceded to a third power in another treaty as the *price* of benefits obtained in exchange from that third power. In other words, the *most-favored-nation* is not the nation which has purchased by concessions the most liberal advantages, for such advantages are not *favors* but *rights* bought for a valuable consid-

[38] (1912) 223 U. S. 317, 334.
[39] *Ibid.* 334.

eration; and the nation claiming such advantages under a 'most-favored-nation' clause may not have paid or be in a position to pay the consideration for which those advantages were granted."

The cases of *Whitney* v. *Robertson*[40] and *Bartram* v. *Robertson*,[41] are relied upon as sustaining this view. It was there held that a special reciprocity treaty between the Hawaiian Islands and the United States did not entitle other nations to take advantage of its terms under the Most-Favored-Nation Clause since such clause was

"* * * never designed to prevent special concessions upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests."[42]

Great Britain has consistently taken a different view as to the scope of the Most-Favored-Nation clause and the matter has been the subject of long and frequent discussion with our State Department.

The difficulties that have arisen with reference to the character or degree of reciprocity in all the disputes concerning the privileges claimed under the Most-Favored-Nation Clause have had reference mainly to questions of tariff and it will be seen by an examination of these cases[43] that the discussions have turned upon the difficulty, not to say the impossibility, of a general reciprocity equally applicable to all countries upon questions of export and import. The character of the products differs radically; the importance of the products to the commerce of one or the other country is of essential difference and the stipulations with reference to discrimination or equalization of duties applicable in the one case are almost universally quite inapplicable in another. So that the equivalent which is complete in the Treaty now under discussion is well-nigh impossible of attainment in matters concerning the importation of merchandise.

Mr. Sherman, as Secretary of State, writing to Mr. Buchanan, Minister to the Argentine Republic, January 11, 1898, illustrates this in the following language.

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[40](1888) 124 U. S. 190.

[41](1887) 122 U. S. 116.

[42](1888) 124 U. S. 190, 193.

[43]Gathered in Moore Dig. Int. Law Vol. 5.

"The neighborhood of nations, their border interests, their differences of climate, soil, and productions, their respective capacity for manufacture, their widely different demands for consumption, the magnitude of the reciprocal markets, are so many conditions which require special treatment. No general tariff can satisfy such demands. It would require a certainty of language which excludes the possibility of doubt to justify the opinion that the government of any commercial nation has annulled its natural right to meet these special conditions by compensatory concessions, or held the right only on condition of extending the same to a nation which had no compensations to offer."[44]

The Treaty with Hawaii which gave rise to the cases of *Bartram* v. *Robertson* and *Whitney* v. *Robertson*[45] is an apt and complete illustration of that lack of equivalent which alone can make the Most-Favored-Nation-Clause inapplicable.

The Treaty with Hawaii provoked claims from most of the countries of Europe as well as from Mexico and Japan, and was the occasion of much diplomatic correspondence before it reached the Supreme Court. By that Treaty the King of the Hawaiian Islands engaged to give advantages to the United States of which it was materially impossible for any other country in the world to furnish an "equivalent." Among other things he covenanted not to

"lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privileges or rights of use therein, to any other power, state or government * * *."[46]

No other country could give to the United States the assurance that this strategic point in the Pacific should be free from foreign occupation, and it seems obvious that no Favored-Nation-Clause in any other Treaty could offset so distinct and unique an advantage, the return for which in a reduction of or freedom from duties was but a small consideration.

These considerations and their importance were recognized by Germany and so well expressed in the Treaty concluded at Berlin in 1879 that we quote the language of the special article referring thereto:

"Certain relations of proximity and other considerations having rendered it important to the Hawaiian government to enter into mutual arrangements with the government of the United States of America by a convention concluded at Washington, the 30th day of January, 1875:

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[44] *Ibid.* 278.

[45] *Supra.*

[46] 5 Moore, Dig. Int. Law 263.

"The two High Contracting Parties have agreed that the special advantages granted by said convention to the United States of America, in consideration of equivalent advantages, shall not in any case be invoked in favor of the relations sanctioned between the two High Contracting Parties by the present treaty".[47]

Here was an express waiver of the otherwise automatic operation of the Most-Favored-Nation-Clause.

This view is emphasized by the letter of our Department of State to the Russion Charge d'Affaires of July 30, 1895:

"The exceptional advantages granted to the Hawaiian Islands * * * have been yielded to that government in return for certain valuable and exclusive considerations and by reason of the peculiar geographical and commercial relations that exist between the two countries.

* * * * * * * *

"As the mutual concessions under the reciprocity treaty between the United States and the Hawaiian Islands are of an exceptional nature, there does not appear to be any present condition leading to a discussion of the question whether the negotiation of this convention has established a precedent to be followed with other countries."[48]

In *Bartram* v. *Robertson* the views of this Court do not differ from the diplomatic views expressed by the Executive Department:

"* * * It does not appear that Denmark has ever objected to the imposition of duties upon goods from her dominions imported into the United States, because of the exemption from duty of similar goods imported from the Hawaiian Islands, such exemption being in consideration of reciprocal concession, *which she has never proposed to make.*

"Our conclusion is, that the treaty with Denmark does not bind the United States to extend to that country, *without compensation,* privileges which they have conceded to the Hawaiian Islands *in exchange for valuable concessions.* On the contrary, the treaty provides that like compensation shall be given for such special favors. * * *"[49]

In *Whitney* v. *Robertson,* the Court followed its earlier decision, and passing upon a like claim, founded upon a Treaty with Santo Domingo, said:

"* * * It is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was

[47] *Ibid.* 265.

[48] For. Rel. 1895, Vol. 2, 1121; 5 Moore Int. Law Dig. 276, 277.

[49] (1887) 122 U. S. 116, 121.

never designed to prevent special concessions, *upon sufficient considerations,* touching the importation of specific articles into the country of the other. * * *"[50]

To conclude, as we have already said in the course of this article, there is no objection to the principle that the Most-Favored-Nation-Clause must rest upon reciprocal stipulations. In this case it does rest upon absolutely reciprocal stipulations, as the Italian Court of Cassation has held. Whenever an apparent exception has been made to the operation of the Most-Favored-Nation-Clause, it will, we repeat, be found to rest upon concessions which cannot be duplicated and the "equivalent" of which cannot be fairly measured or given. This objection does not hold in this case.

It seems certain that the questions here involved with be further litigated in the near future. Doubtless application will be made for letters of administration under other treaties and the clause of the Swedish treaty will be invoked.

From the standpoint of international relations and the position of the United States, as a leader in the cause of amicable relations between the Nations, it is to be hoped that the Supreme Court will take a broad view of these questions unaffected by any doctrine of State rights which, where international considerations are concerned, should not be allowed to play a role which may cripple the efficiency of our National Government and tend to isolate us in the family of Nations.[51]

FREDERIC R. COUDERT.

NEW YORK.

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[50](1888) 124 U. S. 190, 193.

[51]Since writing the above the Supreme Court of Minnesota has passed upon this very question of consular right to letters of administration in *In re* Lis' Estate. Austro-Hungarian Consul *v.* Westphal *et al.* (December 27, 1912) 139 N. W. 300.

In that case the Austro-Hungarian Consul asked for Letters of Administration both in virtue of the local statute, which provided that in certain cases the Consul is to be appointed administrator on the estate of a foreign decedent, and also the Most-Favored-Nation Clause contained in the Austrian Treaty.

Administration was also claimed by the burial corporation which as principal creditor invoked its right under the state statute in the absence of a surviving spouse or next-of-kin.

The Court held that under the terms of the statute the Consul was not entitled to administration because not a resident.

In support of the Consul's claim under the Treaty the counsel for the consulate adduced the Swedish Treaty above referred to. The Court, however, held that this Treaty should not be construed as giving to the Consuls any rights which appear to be inconsistent with the provisions of the local law and that the provision of the Swedish Treaty construed in

the light of the Most-Favored-Nation Clause had no effect upon the laws of Minnesota. Referring to the passage quoted above from the Ghio case indicating that the result might have been different had the Swedish Treaty been in force at the time the application to administration was there made by the Consul, the Minnesota Supreme Court says at page 307:

"In the Rocca Case, Mr. Justice Day seems to refer to the treaty with Sweden as expressly and clearly giving Swedish consuls an absolute right in the premises; *but at most this was a mere dictum,* and we cannot follow it without question, especially as Mr. Justice Day's use of the Swedish treaty by way of comparison with the Argentine treaty, and the language used by him in this connection, may well be referred to the fact that the treaty with Sweden expressly gives the right to be 'appointed administrator,' whereas the Argentine Treaty conferred only the 'right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased.'"

The Court held that while the Swedish Treaty gave in terms the right to be appointed as administrator of such estate, it was held to be qualified by the language "so far as the laws of each country will permit." The Court adds:

"Grammatically it may well be contended that this qualifying clause applied only to the clause with which it is immediately coupled, thus leaving the right to administration without qualification. In view, however, of the presumption so aptly referred to by Mr. Justice Shaw in Estate of Ghio against any intention on the part of the federal government *to invade, by treaty, the province of state law,* in a matter so inherently local, as distinguished from national, and likewise from a consideration of the subject-matter and the provisions of this whole article, and especially the latter part, we have concluded that the right to appointment as administrator is conferred by such article upon the expressed condition that it can be claimed only 'so far as the laws of each country will permit.' * * * Likewise, we cannot think, in the absence of clearly expressed intention so to do, that the federal government intended to take the matter of administration of the estate of foreigners entirely out of the control of the states. See Lanfear *v.* Ritchie, 9 La. Ann. 96; 25 Harv. Law Rev. 735."

It thus appears that if this view prevail generally, the actual effect of the Ghio decision has been to reduce all these Treaty clauses conferring consular rights to administration to mere polite phrases, valueless to the foreign nations with whom the Treaties were made. If this right cannot affect or *pro tanto* supersede the local law, it is impossible to understand why foreign countries should care to further insert such a clause in their Treaties with the United States.

Other Nations would certainly take the same view as that entertained by the Italian Court of Cassation that the right is binding upon them, and if the Ghio decision and the inferences, whether logical or not, drawn from it by our state courts, is to remain law, these nations will find that they have entered into an arrangement which binds them to accord important rights to our representatives, but leaves us entirely free as to theirs. Such a result, seems to me, to rest upon a misconception of State rights and a minimizing of international obligations wholly inconsistent with the present position of the United States in the family of Nations. It furnishes a curious instance of the recrudescence of State sovereignty tendencies which might well be supposed to have fallen into desuetude with the necessary growth of conceded national powers.

The actual situation in the Lis Case seems to furnish an excellent illustration of the utility of the Treaty Clause when broadly interpreted. Surely the property of foreign heirs and creditors would be more secure under the administration of the responsible official representatives of their Nations, than if left to mere local creditors whose sole interest is the obtaining of payment of the debts due to them. The emasculation by interpretation of these clauses would thus seem to be without palliation on any ground of necessity or general justice.